Supreme Court, U.S.
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No. 97-64

In The

Supreme Court of the United States

October Term, 1996

MANH TRAN,

Petitioner,

v.

WAYNE STATE UNIVERSITY AND ITS EMPLOYEES, HARPER HOSPITAL AND ITS EMPLOYEES, J.H. ISAACSON, RESPONDENTS' EMPLOYERS AND FUNDING ORGANIZATIONS AND DEGREE-GRANTING INSTITUTIONS In their official and individual capacities,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For Tie Sixth Circuit

BRIEF N OPPOSITION

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Statement of the Case

This matter comes before the Court on Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, following that court's order affirming the district court's dismissal of two lawsuits filed by Petitioner.

In *Tran I*, Judge Barbara Hackett of the United States District Court for the Eastern District of Michigan entered an order granting Defendants' motion for dismissal and/or summary judgment on March 19, 1996. In *Tran II*, Judge Hackett entered an order of dismissal on March 20, 1996. Although the Sixth Circuit's opinion considered both orders, the appendices attached to the Petition before this court suggests that Petitioner seeks review only of *Tran I*, District Court case no. 95-CV-72662-DT.

On July 3, 1995, Manh Tran (Tran), a former student in the Wayne State University School of Medicine, filed the *Tran I* complaint, making broad, conclusory allegations against the University and J.H. Isaacson (Isaacson) of violations of his right to due process, equal protection, and freedom of expression, as well as race, sex, and national origin discrimination, breach of contract, and libel. Tran alleged that WSU had engaged in negligent hiring and provided him with a poor education. Although not a party to the lawsuit, Tran also alleged that the dean of the medical school acted in bad faith to "reserve medicine for white people" and failed to provide him with equal opportunity and equal protection.

On December 18, 1995, Tran filed the *Tran II* complaint, making the same allegations against Isaacson and other individual defendants.

Manh Tran began medical school at WSU in 1990. During his first two years, which largely consisted of classroom learning, he progressed satisfactorily. In the third year of medical school, during which students are required to participate in clerkships or internships in eight different areas of medical practice, Tran failed. Specifically, Tran received unsatisfactory grades in his family medicine and surgery clerkships. His medicine clerkship was also originally graded as unsatisfactory, but was changed to satisfactory after a re-examination.[1]

On August 6, 1993, the medical school's promotions committee reviewed Tran's third year performance, and, based upon comments received from Tran's evaluators, voted unanimously to require that Tran (1) undergo a mental-emotional status evaluation, (2) appear before the promotions committee upon completion of the evaluation for a hearing to determine his ongoing status as a medical student, and (3) not be permitted to continue with year four until a further decision by the promotions committee.[2]

As required by the School of Medicine, Tran appeared for an evaluation by Dr. Robert Niccolini, a psychiatrist.[3] As a result of his evaluation and the psychological testing done on Tran, Dr. Niccolini concluded:

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[1] The facts pertaining to Tran's progress in medical school are taken from his medical school transcript, a copy of which is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit A.

[2] A copy of the letter advising Tran of these requirements is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit B.

[3] Dr. Niccolini's report is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit C.

> This patient presents as an extremely rigid and unbending individual who shows evidence of severe personality disorder with associated schizoid and passive-aggressive features. . . . The personality disorder traits are considered severe enough to interfere with this young mans [sic] ability to complete medical school and function effectively as a physician. At the very minimum it is recommended that Mr. Tran repeat the entire third year program and be involved in intense psychotherapy during the entire year. The prognosis for his being able to successfully complete medical school, even with this approach, remains extremely guarded.

After receiving Dr. Niccolini's evaluation, the promotions committee met again on September 22, 1993, and decided that Tran would not at that time be promoted to year four. Instead, the committee advised Tran by letter[4] that he would be ineligible for promotion until meeting the following conditions:

1. He must repeat and pass the entire year three curriculum;
2. He must be in psychotherapy prior to commencing the year three curriculum;
3. His therapist must submit monthly reports, the first of which was due no later than November 1, 1993;
4. He must obtain an evaluation of his English language skills; and

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[4] A copy of the letter is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit D.

5. He would receive any credit for year four work satisfactorily completed.

Tran asked the promotions committee to reconsider its decision, but the committee voted against him at its meeting of October 29, 1993.

Tran did not re-enroll in year three, and he apparently did not comply with the other provisions specified by the promotions committee. However, in February of 1994, Tran began sending numerous hostile and threatening letters[5] to Dr. J.H. Isaacson, a former member of the medical school faculty. Isaacson had been one of Tran's evaluators during his primary care clerkship. Ironically, although Isaacson observed problems which needed to be addressed, he graded Tran as satisfactory for the clerkship.

When the promotions committee became aware of Tran's letters to Isaacson and to the Cleveland Clinic, where Isaacson was then employed, the committee voted on February 25, 1994, to refer Tran for a behavioral evaluation. This is a process provided for by the University's guidelines for assisting persons with behavioral problems.[6] The guidelines provide that a student may be referred to a behavior evaluation committee if a student (1) threatens himself or others and/or (2) appears to have a behavioral or psychological problem which severely

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[5] Copies of Tran's letter to Isaacson and to Isaacson's new employer are attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit F.

[6] A copy of the guidelines is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit H.

impairs his ability to function within the University environment. On March 9, 1994, the promotions committee formally requested the dean of the medical school to refer Tran to the behavior evaluation committee.[7] The committee requested that the behavior evaluation committee determine whether or not Tran was a danger to himself or to faculty members, and further to decide whether Tran was fit to continue the study of medicine.

On March 21, 1994, Robert J. Sokol, dean of the medical school, requested Provost Marilyn Williamson to convene the behavior evaluation committee to review Tran's status. On March 29, 1994, the Provost wrote to Dr. Ralph Rubenstein, chair of the behavior evaluation committee, and asked him to convene the committee promptly to hear Mr. Tran's case.[8]

On May 13, 1994, the behavioral evaluation committee provided its report to Dean Sokol.[9] The committee summarized its findings as follows:

> Mr. Tran is a bright young man who has done better than average in the first two years of classroom work. His problems began in year three when his interpersonal interactions with

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[7] A copy of this March 9 memorandum is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit I.

[8] A copy of the Provost's March 29, 1994, letter is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit J.

[9] A copy of the report is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit K.

> interns, residents, and attendings became a source of intermittent problems.
>
> Mr. Tran's personality traits are rigidly fixed and egosyntonic. He perceives his problems as entirely outside of himself. Such a dynamic presence does not bode well for resolution in therapy.

Pursuant to paragraph 4.0 of the guidelines, Dean Sokol provided Tran with a copy of the committee's summary of the nature of the problem, with written notice of an opportunity to be heard by the dean. On June 13, 1994, the dean met with Tran, along with Dr. Charles Whitten, then associate dean of the medical school.

Paragraph 5.0 of the guidelines provides:

> The Dean shall decide on the actions to be taken, which may include separation from the University, and will provide written notice of that action to the student . . .

Following the meeting on June 13, Dean Sokol notified Tran that, based on his noncompliance with conditions for re-admission and the belief that further delay would be neither useful nor helpful to Tran, the dean was separating Tran from the School of Medicine and the University.[10]

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[10] A copy of the Dean's letter is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit L.

On June 18, 1994, Tran wrote to Dean Sokol asking for reconsideration. On June 26, 1994, the dean denied Tran's request.[11]

As permitted by the guidelines, Tran appealed to the provost, Marilyn Williamson. On July 19, 1994, Provost Williamson wrote to Tran, advising him that she had reviewed the entire record of his case as to substance and procedure and that she found no basis to reverse the dean's decision to separate Tran from the School of Medicine and the University.[12]

Argument

It is clear from her opinion in *Tran I* that Judge Hackett dismissed Tran's breach of contract and due process claims under F. R. Civ. P. 56. Tran's discrimination, freedom of speech, and libel claims were dismissed under F. R. Civ. P. 12(b)(6). Finally, Petitioner's discrimination claim against the University under 42 U.S.C. § 1983 was dismissed based upon the University's Eleventh Amendment immunity. In *Tran II*, Judge Hackett dismissed Tran's claims of discrimination, harassment, and denial of

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[11] A copy of the Dean's June 26 letter is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit M.

[12] A copy of the Provost's letter is attached to Defendant's Brief in Support of Motion to Dismiss (Tran I docket entry 35) as Exhibit N.

equal protection for the same reasons they were dismissed in *Tran I.*[13]

I. PETITIONER FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In order to survive a 12(b)(6) motion to dismiss, the complaint must set forth enough information to outline the elements of a claim or to permit inferences to be drawn that the elements exist. *Jenkins v. McKeithen,* 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969); *German v. Killeen,* 495 F. Supp. 822 (E.D. Mich. 1980). Conclusory allegations are not acceptable, where no facts are alleged to support the conclusion or where the allegations are contradicted by the facts themselves. *Vermillion Foam Products Co. v. General Electric Co.,* 386 F. Supp. 255 (E.D. Mich. 1974).

In this case, Tran's complaints are broad and quite conclusory, failing to allege the elements of any claim. For example, a claim under the due process clause requires that a plaintiff allege four elements: (1) a recognized liberty or property interest, (2) at least a temporary deprivation of the liberty or property, (3) some form of state action, and (4) the assertion of a governmental or public reason for the deprivation. See e.g. *Craig v. Carson,* 449 F. Supp. 385, 390 (M.D. Fla. 1978), and cases cited therein.

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[13] The dismissal in Tran II was on the court's own motion. The court did not specify whether the complaint was being dismissed under rule 12(b)(6) or 56, but the reasoning in the Tran II dismissal tracks the reasoning in the Tran I dismissal, so it may be inferred that both rules were utilized.

Petitioner has not alleged a recognized liberty or property interest, nor has he demonstrated the infirmity of any reasons cited for his removal from the medical school and the University.

With regard to his other constitutional claims, Petitioner has not alleged in any way any facts to support a conclusion that he has been denied equal protection or that his freedom of expression has been impaired.

With regard to Petitioner's claims of race, sex, and national origin discrimination, he must show that he is a member of a protected group and that he has been discriminated against on the basis of his group membership, either through a predisposition by defendants to such discrimination or by disparate treatment of plaintiff and others who do not belong to the protected group. Petitioner has not alleged a single incident in which a person not of his race, sex, or national origin has been treated differently for the same conduct or academic infirmities.

Petitioner also broadly alleged libel against Defendants. A claim of libel requires that a plaintiff allege (1) a false and defamatory statement concerning plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of defendants, and (4) either defamation per se or the existence of special harm caused by the publication. *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 174-175; 398 N.W. 2d 245 (1986). Obviously, Petitioner's complaint has not met this burden.

Petitioner also alleged a breach of contract. In order to recover on this theory, Tran must prove (1) that a contract existed between the parties, (2) the terms of the

contract, (3) the defendants breached the contract, and (4) that the breach caused Tran's injuries. *Platsis v. E.F. Hutton & Co., Inc.*, 642 F. Supp. 1277 (W.D. Mich. 1986), *aff'd* 829 F.2d 13 (6th Cir. 1987). It is apparent from even a cursory review of Tran's complaint that he has not pled the required elements for breach of contract.

II. AS TO HIS DISCRIMINATION CLAIMS, PETITIONER HAS NOT MET THE NECESSARY PREREQUISITES.

To the extent that Petitioner alleges claims under Title VII, 42 U.S.C. §2000e-5, filing a complaint first with the U.S. Equal Employment Opportunity Commission and receiving a right-to-sue letter are necessary prerequisites to this action. *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989). To Respondents' knowledge, Petitioner has not filed a claim with the EEOC, nor has he received a right-to-sue letter. Certainly, he has not alleged these necessary prerequisites in his complaint.[14]

III. PETITIONER'S COMPLAINTS LARGELY ATTACK THE WISDOM OF DECISIONS LEFT TO THE SOUND DISCRETION OF THE UNIVERSITY.

When analyzing the propriety of the University's academic decisions regarding Tran, it is important to keep

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[14] Although Plaintiff attempted to show on appeal that he had a right-to-sue letter, he attached to his brief only complaints filed after his lawsuits had been dismissed.

in mind the judiciary's historical and firmly established deference to academic decision making.

In *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978), this Court considered the proper role of the judiciary in reviewing academic decisions. In *Horowitz*, a student was dismissed from her final year of medical school after expressions of faculty dissatisfaction with her clinical performance. In reversing the Court of Appeals and allowing the dismissal to stand, the Court stated:

> The decision to dismiss Respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. *Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and does not readily adapt it to the procedural tools of judicial or administrative decision-making.*
>
> 435 U.S. at 89-90 (emphasis supplied).

Concurring in *Horowitz*, Justice Powell observed:

> University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.
>
> 435 U.S. at 96, n6.

This Court subsequently reaffirmed the notion of judicial deference to academic decisions in *Regents of The University of Michigan v. Ewing*, 474 U.S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985), another case in which a student had been dismissed from medical school:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
>
> 474 U.S. at 225 (footnote omitted). See also *Hines v. Rinker*, 667 F. 2d 699 (8th Cir. 1981).

Historically, the courts have refused to second-guess academic decisions:

> Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S. at 603, 17 L. Ed. 2d 629, 87 S. Ct. 675; *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (Opinion of Warren, C.J.), but also and somewhat inconsistently, on autonomous decision-making by the academy itself. See *University of California Regents v. Bakke*, 438 U.S. 265, 312, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (Opinion of Powell, J.); *Sweezy v. New Hampshire*, 354 U.S. at 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (Frankfurter, J., concurring in result).

> *Regents of The University of Michigan v. Ewing,* 474 U.S. 214, 226, n12, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985).

In *Crook v. Baker,* 813 F. 2d 88 (6th Cir. 1987), the court quoted approvingly from a decision of the Ohio Supreme Court which observed:

> Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards.
>
> 813 F. 2d at 93, quoting *Waliga v. Board of Trustees,* 22 Ohio St. 3d 55, 57; 488 N.E. 2d 850, 852 (1986).

The courts' traditional deference to academic decisionmaking has in turn informed their treatment of due process in the academic setting.

The courts have had numerous opportunities to consider the application of constitutional due process guarantees in the academic setting. This Court compared "academic" due process to "disciplinary" due process in *Horowitz, supra.* Specifically, the Court distinguished the academic concerns present in *Horowitz* from the disciplinary concerns implicated in *Goss v. Lopez,* 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), a case in which nine students had received disciplinary suspensions for alleged disruptive or disobedient conduct. In distinguishing *Goss,* the Court in *Horowitz* stated:

> The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.

> This difference calls for far less stringent procedural requirements in the case of an academic dismissal.
>
> 435 U.S. at 86 (footnote omitted).

The Court further stated more pointedly:

> We fully recognize that the deprivation to which Respondent was submitted – dismissal from a graduate medical school – was more severe than the ten-day suspension to which the high school students were subjected in *Goss*. And a relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.' *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18 (1976). But the severity of the deprivation is only one of several factors that must be weighed in deciding the exact due process owed. *Ibid. We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the due process clause of the Fourteenth Amendment.*
>
> 435 U.S. at 86, n3 (emphasis supplied).

Consequently, the procedural due process owed to Petitioner in this case was minimal, with no hearing required. It is equally true that Petitioner's substantive due process rights, if they exist, are likewise minimal. A recent Sixth Circuit case summarized the requirements of substantive due process in the academic setting:

> Substantive due process, a much more ephemeral concept, protects specific fundamental rights of individual freedom and liberty from

> deprivation at the hands of arbitrary and capricious government action. The fundamental rights protected by substantive due process arise from the constitution itself and have been defined as those rights which are 'implicit in the concept of ordered liberty.' *Palk v. Connecticut,* 302 U.S. 319, 325 (1937), overruled on other grounds, *Benton v. Maryland,* 395 U.S. 784, 794 (1969). While this is admittedly a somewhat vague definition, it is generally held that an interest in liberty or property must be impaired before the protections of substantive due process becomes available. See e.g., *Regents of The University of Michigan v. Ewing,* 106 S. Ct. 507, 512 (1985); *Jeffries v. Turkey Run Consolidated School District,* 492 F. 2d 1, 4-5 (7th Cir. 1974). *Even if such an interest has been impaired by governmental action, courts will review the challenged decision only for arbitrariness or capriciousness. Indeed, in the academic setting, as the Supreme Court made clear in Ewing, courts may override the decision under substantive due process only if that decision is 'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.' Ewing,* 106 S. Ct. at 513.
>
> *Gutzwiller v. Fenik,* 860 F. 2d 1317, 1328 (6th Cir. 1988) (emphasis supplied).

In order to establish arbitrary and capricious action, Petitioner must prove there was no rational basis for the University's decision or that the decision was motivated by bad faith or ill will unrelated to academic performance. *Stevens v. Hunt,* 646 F. 2d 1168, 1170 (6th Cir. 1981); *Hines v. Rinker,* 667 F. 2d 699, 703 (8th Cir. 1981);

Gaspar v. Bruton, 513 F. 2d 843, 851 (10th Cir. 1975); Accord *Regents of the University of Michigan v. Ewing*, *supra*, 474 U.S. at 225.

The foregoing authorities demonstrate the reluctance with which courts review academic decisions. Procedural due process is minimal and decisions are reviewed substantively, if at all, under an "arbitrary and capricious" standard.

In the present case, it is evident that the decisions rendered by the University and the School of Medicine have been academic decisions within the traditional province of the University. Moreover, it is clear that Tran has been provided procedural and substantive due process. At each step of the process, Tran has had the right to appeal, to make his case before each committee, or to abide by the conditions established for his readmission. He has met with the dean of the medical school and had his appeal reviewed by the provost of Wayne State University. The record in this case is one in which the medical school and the University have adhered closely to their published guidelines for assisting persons with behavioral problems, and the decisions rendered have been based on purely academic considerations, well within accepted academic norms. There is certainly no evidence to suggest otherwise.

IV. AS A MATTER OF LAW, RESPONDENTS ARE ENTITLED TO A DISMISSAL OF PETITIONER'S COMPLAINTS.

For a variety of other reasons, the dismissal of the Petitioner's complaints should be affirmed.

A. Wayne State University is entitled to Eleventh Amendment immunity.

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of subjects of any foreign state.

The jurisdictional bar of the Eleventh Amendment protects not only the states themselves, but various agencies and instrumentalities found to constitute an arm or alter ego of the state. *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987) (observing that the vast majority of cases considering the issue have found state universities to be protected by the Eleventh Amendment). Absent an express and specific waiver by a state of its immunity, the states remain immune from suit in federal court. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Although sovereign immunity otherwise applicable to the states and their instrumentalities may be legislatively abrogated, any such abrogation of immunity must be explicit, unambiguous, and show clear congressional intention to subject the states to suit in federal court. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985).

To the extent that Petitioner's complaints attempt to state a claim under 42 U.S.C. § 1983, there is no legislative abrogation of Wayne State University's immunity. *Quern*

v. Jordan, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979).

B. The facts simply do not demonstrate the existence of any cause of action against J.H. Isaacson.

Although Petitioner, in rather sensational terms, excoriates Isaacson for supposed misdeeds, it is evident from the documentary record that Isaacson has done nothing to render himself liable to Petitioner on any theory. Isaacson's exposure to Petitioner as a faculty member resulted in an evaluation in which Isaacson graded Tran as satisfactory in that clerkship, so the grade assigned had no influence on Tran's dismissal from the medical school. To the extent that Isaacson raised questions regarding Tran's suitability to practice medicine, these questions were subsequently addressed by Dr. Niccolini's evaluation, the report of the behavioral evaluation committee, and the subsequent deliberations of the promotions committee, the dean, and the provost. Tran was not dismissed because of Dr. Isaacson's evaluation, but was dismissed because the School of Medicine determined that he was unsuited for the practice of medicine.

C. Plaintiff's second complaint is barred by the doctrine of *res judicata*.

Although Isaacson is the only common defendant between Plaintiff's two lawsuits, Plaintiff has made the same allegations in both cases, arising out of the same transactions and occurrences, varying only the individual defendants named. Despite this slight variance in his

pleadings, Plaintiff cannot overcome the effect of *res judicata*. See *Randles v. Gregart*, 965 F. 2d 90, 93 (6th Cir. 1992), and cases cited therein.

Conclusion and Relief Requested

For the foregoing reasons, Respondents pray that this Honorable Court will deny the petition for writ of certiorari.

Respectfully submitted,

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